NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 18 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE LUIS MARTINEZ, Defendant-Appellant.	No. 05-50429 D.C. No. CR-03-02959-NAJ MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted May 3, 2006
Pasadena, California

Before: LAY,** KLEINFELD, and SILVERMAN, Circuit Judges.

In January 2005, Jose Luis Martinez was convicted by a jury under 8 U.S.C. § 1326 of being a previously deported alien found in the United States. On appeal, he argues the district court erred by not granting his motion to dismiss the § 1326

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

charges. In the alternative, he argues the court erred by refusing to allow him to present evidence regarding the lawfulness of his deportation to the jury. He then argues the court erred by finding him competent to stand trial despite his insistence on taking the stand and testifying regarding irrelevant matters. He also argues the court erred when sentencing him by relying on facts not alleged in the indictment or found by a jury. Finally, he argues that § 1326 is unconstitutional. We have jurisdiction under 28 U.S.C. § 1291, and we affirm Martinez's conviction and sentence. Because the parties are familiar with the facts, we do not recite them in detail.

We review de novo a denial of a motion to dismiss an 8 U.S.C. § 1326 indictment "when the motion is based upon an alleged due process defect in the underlying deportation proceeding." United States v. Pallares-Galan, 359 F.3d 1088, 1094 (9th Cir. 2004). Because the underlying removal order serves as a predicate element under 8 U.S.C. § 1326, due process entitles a defendant charged with illegal entry to collaterally attack the removal order. Id. at 1095. To sustain a collateral attack, a defendant must show that he "exhausted any administrative remedies that may have been available. . . ." 8 U.S.C. § 1326(d)(1).

At the conclusion of his deportation hearing, the Immigration Judge ("IJ") notified Martinez of his right to appeal to the Board of Immigration Appeals

("BIA"). Martinez filed a timely appeal, but withdrew it before review. Although Martinez concedes he failed to complete his appeal with the BIA, he argues this is irrelevant. According to Martinez, his claim that he was not given a list of free legal services in Spanish constitutes a deprivation of counsel, which is a "constitutional challenge to INS procedures" that falls outside the exhaustion requirement in § 1326(d)(1). We disagree.

We have held that 8 U.S.C. § 1252(d)(1)[1]—which governs this court's jurisdiction to review final orders of removal—"mandates exhaustion and generally bars us, for lack of subject-matter jurisdiction, from reaching the merits of a legal claim not presented in administrative proceedings below." Barron v. Ashcroft, 358 F.3d 674, 678 (9th Cir. 2004). In Barron, we clarified which constitutional challenges would be excluded from the § 1252(d)(1) exhaustion requirement:

> We recognize that the principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide. Among such challenges may be due process claims, but only if they involve more than "mere procedural error" that an administrative tribunal could remedy.

Id.; see also Agyeman v. I.N.S., 296 F.3d 871, 877 (9th Cir. 2002) ("[W]e may not

---

[1]Section 1252(d)(1) provides "[a] court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right . . . ."

entertain due process claims based on correctable procedural errors unless the alien raised them below."). The analysis in Barron regarding which constitutional claims are subject to the exhaustion requirement in § 1252(d)(1) applies with equal force to the exhaustion requirement in § 1326(d)(1). Even if Martinez is correct that the agency failed to provide him with a list of counsel in Spanish and that failure to provide such a list is error, it was a "procedural error" which the BIA could have remedied. Had Martinez raised this claim with the BIA—and the agency had found it meritorious—the agency could have remanded Martinez's case for a rehearing with instructions that Martinez receive the relevant list. Thus, by not raising this claimed procedural error with the BIA, Martinez has failed to exhaust his administrative remedies. Therefore, under § 1326(d)(1), he cannot sustain a successful collateral attack against the validity of his underlying deportation.

Martinez argues in the alternative that the lawfulness of his underlying deportation was an element of the offense under § 1326 that should have been submitted to the jury. The interpretation of a statute is a question of law that is reviewed de novo. United States v. Ripinsky, 20 F.3d 359, 361 (9th Cir. 1994). We expressly held in United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996), that "the lawfulness of [a] prior deportation is not an element of the

offense under § 1326"—and that, accordingly, an alien charged under § 1326 is "not entitled to have the issue determined by a jury." See also United States v. Mendoza-Lopez, 481 U.S. 828, 835 (1987). Accordingly, we hold the district court did not err in refusing to submit the lawfulness of Martinez's underlying deportation to the jury.

Martinez next argues that the district court erred by finding him competent to stand trial as a previously deported alien found in the United States under § 1326. A district court's determination that a defendant is competent to stand trial is reviewed for clear error. See United States v. Gastelum-Almeida, 298 F.3d 1167, 1171 (9th Cir. 2002). "On defendant's appeal the evidence relating to his competency must be considered in the light most favorable to the Government." United States v. Chischilly, 30 F.3d 1144, 1150 (9th Cir. 1994). The reviewing court's inquiry is not whether the trial court could have found the defendant either competent or incompetent, nor whether the court would find the defendant incompetent if it were deciding the matter de novo. Chavez v. United States, 656 F.2d 512, 515-16 (9th Cir. 1981). Rather, the reviewing court examines the record "to see if the evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence." Id. at 516.

To determine that a defendant is mentally incompetent, the court must find by a preponderance of the evidence that "the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense . . . ." 18 U.S.C. § 4241(d). Martinez argues that the reports of the mental-health experts who evaluated him, considered in the context of his counsel's comments about his competency, established he was unable to help his attorney and assist in his own defense. However, viewing the facts in the light most favorable to the government, this argument fails. The district court's competency determination was based on the recommendation of a psychologist who, after treating Martinez for four months, concluded he did not meet the standard set forth in 18 U.S.C. § 4241. The specialist stated that, "[w]hile I can offer no guarantee that [Martinez] will remain free of stubbornness, no deficit in his actual capacity to assist counsel was displayed." Given the specialist's express conclusion after four months of treatment that Martinez was able to assist counsel, we hold the district court did not clearly err in concluding that Martinez was competent to stand trial.[2]

[2]Martinez also argues that the district court should have reevaluated his competency after his "illogical" testimony. However, when the district court made its competency determination before trial, Martinez's counsel had made it clear

Finally, Martinez's arguments that United States v. Almendarez-Torres, 523 U.S. 224 (1998), has been overruled are barred by circuit precedent. See United States v. Quintana-Quintana, 383 F.3d 1052, 1053 (9th Cir. 2004).

AFFIRMED.

---

that Martinez planned on testifying—against counsel's wishes—about the unfairness of his deportation. The record indicates Martinez testified just as his counsel predicted. Thus, no new reasons came to light regarding Martinez's competency during his testimony.